"Beech-Nut System of Merchandising" So Prevents Competition as to Justify Action by Federal Trade Commission.—In Federal Trade Comm. *v.* Beech-Nut Packing Co., 42 Sup. Ct. Rep. 150, the Supreme Court of the United States held that, a system of merchandising employed by a manufacturer of food and other products, under which distributors of its products not maintaining the resale prices fixed by it were subject to be reported to it by special agents or other dealers, and to be enrolled upon a list of price cutters, to whom goods would not be sold until their records were cleared by means of satisfactory assurances that they would not resell the goods, except at suggested prices, and would refuse to sell to distributors who did not maintain such prices, so to prevent competition as to authorize the Federal Trade Commission to order a discontinuance of the practice of reporting the names of dealers not observing resale prices and enrolling their names on lists of undesirable purchasers, etc., employing salesmen or agents to report dealers not observing such resale prices, etc., utilizing numbers and symbols marked on cases containing its products, with a view to ascertaining the names of dealers not observing its prices, or utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by it.

Mr. Justice Day in delivering the opinion of the court said in part:

"It is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

"The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is employed to condemn and suppress. The case now before us was begun under the Federal Trade Commission Act which was intended to supplement previous anti-trust legislation. See Report, No. 597, of the Senate Committee on Interstate Commerce, June 13, 1914, 63d Congress, 2d Session. That act declares unlawful 'unfair methods of competition' and gives the Commission authority after hearing to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the act, is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act. See Report, No. 597, Senate Committee on Interstate Commerce, June 13, 1914, 63d Congress, 2d Session.

"Of the Federal Trade Commission Act we said, in Federal Trade Commission *v.* Gratz, 253 U. S. 421, 427, 40 Sup. Ct. 572, 574 (64 L. Ed. 993):

'The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.'

"If the 'Beech-Nut system of merchandising' is against public policy, because of 'its dangerous tendency unduly to hinder competition or to create monopoly,' it was within the power of the Commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the Colgate Case was held to be within the legal right of the producer.

"The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as 'Undesirable—Price Cutters,' to whom goods are not to be sold, and who are only to be reinstated as one whose record is 'clear' and to whom sales may be made upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices.

"From his course of conduct a court may infer—indeed, cannot escape the conclusion—that competition among retail distributors is practically suppressed for all who would deal in the company's products are constrained to sell at the suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated or who are on the company's list of undesirables until they are restored to favor by satisfactory assurances of future compliance with the company's schedules of resale prices. Nor is the inference overcome by

the conclusion stated in the Commission's findings that the merchandising conduct of the company does not co stitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

"Under the facts established we have no doubt of the authority and power of the Commission to order a discontinuance of practices in trading, such as are embodied in the system of the Beech-Nut Company.

"We are, however, of opinion that the order of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company."

Justice Holmes, Justice McKenna, Justice Brandeis and Justice McReynolds, dissenting.

Livestock Not "Perishable Property."—In Reigel *v.* Franzel, 191 N. Y. Supp. 126, the Supreme Court, Seneca County, held that the New York Civil Practice Act, sec. 980, authorizing the court to direct the sale of the property in controversy if it is perishable or liable to be injured by keeping, applies only where the injury feared is an